SUPREME COURT OF THE UNITED STATES.

No. 348.

THE UNITED STATES, APPELLANTS,

vs.

ROBERT FLOYD.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimant's petition	1	1
Traverse by assistant solicitor	8	5
Final judgment of the court thereon	9	6
Application of solicitor for allowance of appeal	10	6
Order of the court allowing the same	11	6
Finding of the facts in the case, and the conclusions of law on which the court founds its judgment	12	7
Certificate	17	9

SUPREME COURT OF THE UNITED STATES.

ROBT. FLOYD
vs.
THE UNITED STATES. } No. 189.

SPEED & DAVIES
vs.
THE UNITED STATES. } No. 195.

Additional authorities cited for Appellees.

IV.

Where a particular authority is confided in a public officer, to be exercised in his discretion, upon an examination of facts of which he is the appropriate judge, his decision thereon, in the absence of any controlling provision, is absolutely final—

Applied to the case of a Government Surveyor, who surveys an entry in the name of A as assignee of B, it is to be presumed that sufficient evidence was produced before him that A was the grantee of B.—*Ross* vs. *Reed*, 1 *Wheat.*, 482.

Applied to the case of a grant to an individual by an officer of the Spanish Government, it is to be presumed that that officer complied with the conditions of the Spanish law.—*U. S*, vs. *Arredondo et al.*, 6 *Peters*, 727; *Strother* vs. *Lucas*, 12 *Peters*, 410; *U. S.* vs. *Clarke*, 8 *Peters*, 452; *Delassus* vs. *U. S.*, 9 *Peters*, 134—

Applied to the case of a patent for land issued by the proper officers of the United States, it is to be presumed that all the conditions of the law have been complied with.—*Polk* vs. *Wendell*, 9 *Cranch*, 98; *Bagnell* vs. *Broderick*, 13 *Peters*, 450; *Minter et al.* vs. *Crommelin*, 18 *Howard*, 88.

The same principle applies to a patent for an invention.—*Phil. and Trent, R. R. Co. vs. Stimpson*, 14 *Peters*, 449; *Allen vs. Blunt et al.*, 3 *Story R.*, 743.

Applied to the case of a court-martial where the articles of war

direct that a general court-martial shall not consist of less than 13 members, where that number can be convened without manifest injury to the service—and further providing, that any general officer commanding an army or colonel commanding a separate department may appoint general courts-martial when necessary:

Held that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a mattter submitted to his sound discretion, must be conclusive.—*Martin* vs. *Mott*, 12 *Wheat.*, 34–35.

Applied to the case of a public exigency arising, by which the President is authorized to call forth the militia under the act of Feb. 28, 1795.—(1 *Stat. at Large*, 424):

Held that the President is the exclusive judge of the existence of the exigency, and that his decision on that matter cannot be impugned.—*Martin* vs. *Mott*, 12 *Wheaton*, 19–28; *Vanderheyden* vs. *Young* (Spencer, J.,) 11 *Johnson*, 158.

Applied to the case of a naval commander who, under the authority of the act of Congress app'd March 2, 1867, retained a marine in the naval service after his term of enlistment had expired, and under the 3d article for the government of the navy inflicted punishment upon the marine for insubordinate conduct—

Held that "the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable."—*Wilkes* vs. *Dinsman*, 7 Howard, 89.

Applied to the case of a sale of perishable goods by a Collector of Customs under the act of Aug. 6, 1846.—(9 *Stat. at Large, p.* 53.) *sec.* 1.; *Gould et al.* vs. *Hammond*, 1 *McAll, p.* 235.

HUGHES, DENVER & PECK,

Atty's for Appellees.

U. S. Court of Claims.

Petition.

ROBERT FLOYD
vs.
THE UNITED STATES.

To the Honorable Court of Claims:

The petition of Robert Floyd, a citizen of the United Sates, resident in the city of Louisville, State of Kentucky, sheweth unto the Court, that on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and sixty-four, Major H. C. Symonds, of the Commissary Department of the United States Army, then on duty as a commissary of subsistence in the United States Army for the military district of Kentucky, acting under the authority vested in him as such commissary of subsistence, for and on behalf of the United States, entered into a contract with the petitioner, which contract was in writing and is as follows:

Articles of agreement entered into this 27th day of October, eighteen hundred and sixty-four, between Major Henry C. Symonds, Commissary of Subsistence, an officer in the service of the United States of America, of the one part, and Robert Floyd, of Louisville, county of Jefferson, State of Kentucky, of the other part.

This agreement witnesseth, that the said Major Henry C. Symonds, Commissary of Subsistence, for and on behalf of the United States of America, and the said Robert Floyd, for himself, his heirs, executors and administrators, have mutually agreed and by these presents do mutually covenant and agree to and with each other as follows, viz.:

First. That the said Robert Floyd shall slaughter, dress, cut, pack and cure into pork or bacon fifty thousand (50,000) hogs, as follows, or otherwise, as the commissary of subsistence shall direct,
2 viz.:

2nd. The hogs to be taken at the pens, sent to the slaughter-house, killed, dressed, and hung up to cool; then to be cut, if practicable, as follows:

3d. The body into four (4) pound pieces, packed, salted and brined in barrels, which are to be well coopered, ready for delivery. The hams and shoulders to be closely trimmed, bulked in salt, in the manner best adapted to curing, then turned, handled, and cured and smoked and packed in tierces ready for delivery; the head, leaf, fat, and trimmings, and all lard-yielding parts rendered into best possible quality of lard, run into packages, to be well coopered ready for delivery.

4th. The dead hogs' guts, offal, and all grease-yielding parts to be rendered into grease, run into packages, to be well coopered ready for delivery.

Second. That for the purpose of carrying out this agreement, the said Robert Floyd shall provide himself with such buildings, pens, tools, water, and labor of every description, as shall be necessary to perform the work in the most thorough and business-like manner; and they shall receive therefor from the United States in currency, or its equivalent, the sum of ninety-two and one-half cents (92½c.) per one hundred (100) pounds net of hog meat—the weight to be determined by weighing the hogs when cooled ready for cutting at the block.

Third. Payment shall be made at the rate of fifty (50) cents per 100 pounds for each and every thousand (1,000) hogs packed or bulked, (as the case may be,) until the whole number of hogs presented to be cured, when twenty-five (25) cents per 100 pounds additional will be paid; and the final and complete payment shall be made when all the products are delivered, or ready for delivery, to the United States.

Fourth. Not more than two (2) of the known pork-houses of the city shall be used by the party of the second part for the purposes of this contract, and the United States shall be responsible for any losses or injury to the meat arising from causes external to the pork-house and grounds pertaining thereto, but the said Robert Floyd shall use all due care and diligence to protect the United States against any loss arising from causes within the area of the property used for the purposes of this contract.

3 Fifth. The United States shall furnish suitable guards to be stationed around and outside said area or areas for the purpose of external security, and the party of the second part shall provide such watch or guard as necessary for internal security.

Sixth. The whole process from beginning to end shall be subject to such inspection and control as the commissary of subsistence shall, from time to time, demand for the interest of the government.

Seventh. No member of Congress, officer, or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or to any benefit which may arise herefrom.

Eighth. This contract to be subject to the approval of the Commissary General of Subsistence.

In witness whereof, the undersigned have hereunto placed their hands and seals the day and date first above written.

H. C. SYMONDS,
Major and C. S.

Witnesses:
JAMES C. SAVAGE.
SAM'L F. BISHOP.

ROBT. FLOYD.

[Five cent stamp.]

It is understood that, as a proviso of this contract, I am to furnish all the hogs at the pork-house pens, also all the cooperage, salt, &c., at the pork-house yard.

H. C. SYMONDS,
Major and C. S.

That no further or additional directions were given your petitioner under the first clause in said contract, at any time. That no member of Congress, or other person in the employment of the government, was ever admitted to any share or benefit in said contract.

That said contract was duly approved by the Commissary General of Subsistence of the United States Army.

And your petitioner further shows, that immediately upon the execution of said contract he gave a bond in the penalty of seventy-five thousand dollars, with Silas F. Miller and William B. Hamilton as his sureties, conditioned for the faithful performance by him
4 of the said contract, which was duly approved and accepted by the said commissary of subsistence; and that in pursuance of the said contract he immediately rented two large and commodious buildings with pens attached thereto, erected for the purpose of slaughtering hogs, situated in said city of Louisville, and well known as among the pork houses in said city; and further provided himself with all the tools, labor, skill, water and apparatus, and all else that was necessary on his part under his contract to faithfully comply with its terms, and on or about the tenth of November, A. D. 1864, he notified the said commissary of subsistence that he was ready to receive the hogs and to proceed with their slaughter, &c.

That the said commissary of subsistence, acting on behalf of the United States, in pursuance of the said contract, soon thereafter furnished your petitioner with the corn, fuel, salt, cooperage, &c., necessary for the slaughtering and packing the said fifty thousand hogs, and from time to time, up to and until the twenty-fifth of December, A. D. 1864, delivered to your petitioner sixteen thousand one hundred and seventy-seven (16,177) hogs; all of which he slaughtered, cut, packed, bulked, cured, and rendered into lard and grease, in accordance with the terms of the said contract, and for which he has been fully paid by the United States. That the average weight of the said sixteen thousand one hundred and seventy-seven (16,177) hogs, after they had dried and cooled and were ready for cutting at the block, was two hundred and seven and $\frac{88}{100}$ pounds net weight.

And your petitioner shows that he has at all times and in all respects complied with all of the stipulations in said contract on his behalf, except as in hereafter stated, and has been ready and willing to perform all the service required of him by said contract. That expecting and relying upon the fulfillment of the stipulations in said contract on the part of the government, he provided at a great expense and outlay, sufficient buildings, pens, tools, water, skill and labor for slaughtering the whole number of fifty thousand hogs, and at a great expense kept the same in readiness to perform the said service for the United States, so long as there was any reasonable prospect that the United States would comply with its stipulations by furnishing the said fifty thousand hogs to be slaughtered, &c., to wit: until the first day of January, A. D. 1865.

5 And your petitioner shows, that if the United States had furnished the fifty thousand hogs to your petitioner within a reasonable time, according to the terms of said contract, the addi-

tional expense to your petitioner for slaughtering, cutting, packing, bulking, curing, and rendering them into lard and grease, &c., according to the terms of said contract, over and above the expenses which he had already incurred in that behalf, would not have exceeded five thousand dollars.

But your petitioner shows that the remainder of said hogs, that is to say, the number of thirty-three thousand eight hundred and twenty-three hogs called for by said contract, were never furnished to your petitioner by the said commissary of subsistance, nor by any other officer or person for or on behalf the United States, at any time.

But the United States and its officers have wholly failed and refused to deliver the said thirty-three thousand eight hundred and twenty-three hogs, or any part thereof, to your petitioner, in violation of said contract.

Although the said commissary of subsistance, who represented the United States in this matter, was frequently requested so to do by your petitioner, to wit: between the tenth day of November, 1864, and the 25th day of December, A. D. 1864.

That by reason of such failure on the part of the United States to deliver the said thirty-three thousand eight hundred and twenty-three (33,823) hogs, the buildings, pens, water, tools, skill, and labor furnished as aforesaid by your petitioner, was to a great extent kept idle and unemployed; that with the exception of two or three days, there were not sufficient number of hogs furnished him under said contract to run one of his said houses to more than one-half of its capacity.

That the average weight of the hogs which are fit and suitable for the purposes of the United States government, and were intended by both of the parties to said contract, is two hundred and seven and 88-100 pounds, and the sum which your petitioner would have been entitled to receive from the United States, if the said number of thirty-three thousand eight hundred and twenty-three hogs had been delivered to your petitioner and slaughtered, cured, &c., according to the terms of said contract, would have been sixty-
6 five thousand and thirty-seven dollars and ninety cents, ($65,037 90.) While the additional outlay which your petitioner would have been compelled to incur in completing the service required of him by the contract, would have been five thousand dollars as aforesaid, leaving the balance which your petitioner would have received from the United States, over and above what he would have been compelled to further expend, of the sum of sixty thousand thirty-seven 90-100 dollars, ($60,037 90.)

Your petitioner further shows, that he was absolutely prevented from performing the service required of him by the said contract, as to the said thirty-three thousand eight hundred and twenty-three hogs, solely and entirely by the default and failure of the United States, and not by his own default and negligence in any degree.

Wherefore, he says there is due him from the United States the sum of sixty thousand thirty-seven and 90-100 dollars ($60,037 90)

as damages accruing to him for the said breach of contra*f law on* your petitioner further shows, that he has made application Commissary General of the United States for the payment of his claim, which has been refused by the said Commissary General, w alleges as his reason therefor, that the said contract did not requir the United States to deliver to your petitioner any particular number of hogs; that there has been no other action in said case by any of the departments of the government or by Congress.

That no person is owner of or interested in said claim except himself. That your petitioner has at all times borne true allegiance to the government of the United States, and has not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said government.

He therefore prays that a judgment may be awarded him against the United States for the said sum of sixty thousand thirty-seven 90-100 dollars ($60,037 90.)

ROBT. FLOYD.

Robert Floyd, the claimant in the foregoing petition, being duly sworn, deposes and says, that no assignment or transfer of said claim, or any part thereof, has ever been made; that he is justly entitled to the amount claimed therein from the United States, after allow-
7 ing all just credits and offsetts; that he has read said petition, and knows the contents thereof, and that he believes the facts as stated in said petition are true.

ROBT. FLOYD.

UNITED STATES OF AMERICA, *District of Kentucky:*

I, A. J. Ballard, clerk of the District Court of the United States for said district, certify that on this day before me, in my said office, Robert Floyd, whose name appears within, and who is personally known to me, subscribed and swore to the within affidavit.

Witness my signature and the seal of said court, this 21 November, A. D. 1865.

[L. S.] A. J. BALLARD, *Clerk.*

[Five cent stamp.]

P. O. address of claimant, is Robert Floyd, Louisville, Ky.

Address of claimant's solicitors, Hughes, Denver & Peck, 218 F st., Washington, D. C.

8 In the United States Court of Claims.

October term, A. D. 1865.

THE UNITED STATES *ats.* ROBERT FLOYD. } No. 2,185.

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein; and

tional expense to your petitioner for slaughtering, cutting, packing, bulking, curing, and rendering them into lard and grease, &c., according to the terms of said contract, over and above the expenses which he had already incurred in that behalf, would not have exceeded five thousand dollars.

But your petitioner shows that the remainder of said hogs, that is to say, the number of thirty-three thousand eight hundred and twenty-three hogs called for by said contract, were never furnished to your petitioner by the said commissary of subsistance, nor by any other officer or person for or on behalf the United States, at any time.

But the United States and its officers have wholly failed and refused to deliver the said thirty-three thousand eight hundred and twenty-three hogs, or any part thereof, to your petitioner, in violation of said contract.

Although the said commissary of subsistance, who represented the United States in this matter, was frequently requested so to do by your petitioner, to wit: between the tenth day of November, 1864, and the 25th day of December, A. D. 1864.

That by reason of such failure on the part of the United States to deliver the said thirty-three thousand eight hundred and twenty-three (33.823) hogs, the buildings, pens, water, tools, skill, and labor furnished as aforesaid by your petitioner, was to a great extent kept idle and unemployed; that with the exception of two or three days, there were not sufficient number of hogs furnished him under said contract to run one of his said houses to more than one-half of its capacity.

That the average weight of the hogs which are fit and suitable for the purposes of the United States government, and were intended by both of the parties to said contract, is two hundred and seven and 88-100 pounds, and the sum which your petitioner would have been entitled to receive from the United States, if the said number of thirty-three thousand eight hundred and twenty-three hogs had been delivered to your petitioner and slaughtered, cured, &c., according to the terms of said contract, would have been sixty-

6 five thousand and thirty-seven dollars and ninety cents, ($65,037 90.) While the additional outlay which your petitioner would have been compelled to incur in completing the service required of him by the contract, would have been five thousand dollars as aforesaid, leaving the balance which your petitioner would have received from the United States, over and above what he would have been compelled to further expend, of the sum of sixty thousand thirty-seven 90-100 dollars, ($60,037 90.)

Your petitioner further shows, that he was absolutely prevented from performing the service required of him by the said contract, as to the said thirty-three thousand eight hundred and twenty-three hogs, solely and entirely by the default and failure of the United States, and not by his own default and negligence in any degree.

Wherefore, he says there is due him from the United States the sum of sixty thousand thirty-seven and 90-100 dollars ($60,037 90)

as damages accruing to him for the said breach of contract. And your petitioner further shows, that he has made application to the Commissary General of the United States for the payment of his said claim, which has been refused by the said Commissary General, who alleges as his reason therefor, that the said contract did not require the United States to deliver to your petitioner any particular number of hogs; that there has been no other action in said case by any of the departments of the government or by Congress.

That no person is owner of or interested in said claim except himself. That your petitioner has at all times borne true allegiance to the government of the United States, and has not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said government.

He therefore prays that a judgment may be awarded him against the United States for the said sum of sixty thousand thirty-seven 90-100 dollars ($60,037 90.)

ROBT. FLOYD.

Robert Floyd, the claimant in the foregoing petition, being duly sworn, deposes and says, that no assignment or transfer of said claim, or any part thereof, has ever been made; that he is justly entitled to the amount claimed therein from the United States, after allow-
7 ing all just credits and offsetts; that he has read said petition, and knows the contents thereof, and that he believes the facts as stated in said petition are true.

ROBT. FLOYD.

UNITED STATES OF AMERICA, *District of Kentucky:*

I, A. J. Ballard, clerk of the District Court of the United States for said district, certify that on this day before me, in my said office, Robert Floyd, whose name appears within, and who is personally known to me, subscribed and swore to the within affidavit.

Witness my signature and the seal of said court, this 21 November, A. D. 1865.

[L. S.] A. J. BALLARD, *Clerk.*

[Five cent stamp.]

P. O. address of claimant, is Robert Floyd, Louisville, Ky.

Address of claimant's solicitors, Hughes, Denver & Peck, 218 F st., Washington, D. C.

8 In the United States Court of Claims.

October term, A. D. 1865.

THE UNITED STATES *ats.* ROBERT FLOYD. } No. 2,185.

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein; and

not confessing the same, or any part thereof, doth hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States is indebted to said claimant in the sum of sixty thousand and thirty-seven dollars and ninety cents, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

9 In the Court of Claims.

ROBERT FLOYD
vs.
THE UNITED STATES. } No. 2,185.

And now, to wit, 2d of April, 1867, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge and decree, that the said Robert Floyd have and recover of and from the United States the sum of twenty thousand two hundred and ninety-three dollars and eighty cents, ($20,293 80.)

BY THE COURT.

10 Court of Claims.

ROBERT FLOYD
vs.
THE UNITED STATES. } No. 2,185.

The United States, by E. P. Norton, its solicitor, hereby makes application to the honorable Court of Clnims for an appeal, of the case of Robert Floyd *vs.* The United States, to the Supreme Court of the United States.

E. P. NORTON.
Solicitor for the United States.

Filed in the clerk's office, June 10, 1867.

11 At a Court of Claims, held at the Capitol, in the city of Washington, on Wednesday, the 26th day of June, A. D. 1867.

ROBERT FLOYD
vs.
THE UNITED STATES. } No. 2,185.

Mr. Norton, the solicitor, submitted a petition for the allowance of an appeal in this case, from the judgment entered therein on the 2d of April last, to the Supreme Court of the United States; whereupon it was ordered, that the said petition be allowed.

12 *Finding of the facts in the case, and the conclusions of law on said facts on which the court founds its judgment.*

In the Court of Claims.

ROBERT FLOYD
vs.
THE UNITED STATES. } No. 2,185.

The court found the following facts:

1st. That the Secretary of War, through the Commissary General of Subsistence, in the month of October, 1864, and during the pendency of the war, authorized Major Henry C. Symonds, an assistant commissary of subsistence, at Louisville, Kentucky, to purchase hogs, and enter into contracts for slaughtering and packing them to furnish pork for the army. Major Symonds entered into the following contract with the claimant:

Articles of agreement entered into this 27th day of October, eighteen hundred and sixty-four, between Major Henry C. Symonds, Commissary of Subsistence, an officer in the service of the United States of America, of the one part, and Robert Floyd, of Louisville, county of Jefferson, State of Kentucky, of the other part.

This agreement witnesseth, that the said Major Henry C. Symonds, Commissary of Subsistence, for and on behalf of the United States of America, and the said Robert Floyd, for himself, his heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, viz:

First. That the said Robert Floyd shall slaughter, dress, cut, pack and cure into pork or bacon, fifty thousand (50,000) hogs, as follows or otherwise, as the commissary of subsistence shall direct, viz:

2nd. The hogs to be taken at the pens, sent to the slaughter-house, killed, dressed, and hung up to cool; then to be cut, if practicable, as follows:

3d. The body into four (4) pound pieces, and packed, salted and brined in barrels, which are to be well coopered, ready for delivery. The hams and shoulders to be closely trimmed, bulked in salt in the manner best adapted to curing, then turned, handled and cured and smoked and packed in tierces ready for delivery; the head, leaf, fat, and trimmings, and all lard-yielding parts rendered into best possible quality of lard, run into packages, to be well coopered, ready for delivery.

4th. The dead hogs' guts, offal and all grease-yielding parts to be rendered into grease, run into packages, to be well coopered, ready for delivery.

Second. That for the purpose of carrying out this agreement, the said Robert Floyd shall provide himself with such buildings pens, tools, water, and labor of every description, as shall be

necessary to perform the work in the most thorough and business-like manner, and they shall receive therefor from the United States in currency, or its equivalent, the sum of ninety-two and one-half cents (92½c.) per 100 pounds net of hog meat, the weight to be determined by weighing the hogs when cooled ready for cutting at the block.

Third. Payment shall be made at the rate of fifty (50) cents per 100 pounds for each and every thousand (1,000) hogs packed or bulked, (as the case may be,) until the whole number of hogs presented to be cured, when twenty-five (25) cents per 100 pounds additional will be paid; and the final and complete payment shall be made when all the products are delivered, or ready for delivery, to the United States.

Fourth. Not more than two (2) of the known pork-houses of the city shall be used by the party of the second part for the purposes of this contract, and the United States shall be responsible for any losses or injury to the meat arising from causes external to the pork-house and grounds pertaining thereto; but the said Robert Floyd shall use all due care and diligence to protect the United States against any loss arising from causes within the area of the property used for the purposes of this contract.

13 Fifth. The United States shall furnish suitable guards to be stationed around and outside said area or areas for the purpose of external security, and the party of the second part shall provide such watch or guard as necessary for internal security.

Sixth. The whole process from beginning to end shall be subject to such inspection and control as the commissary of subsistence shall, from time to time, demand for the interest of the government.

Seventh. No member of Congress, officer, or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or to any benefit which may arise herefrom.

Eighth. This contract to be subject to the aproval of the Commissary General of Subsistence.

In witness whereof, the undersigned have hereunto placed their hands and seals the day and date first above written.

H. C. SYMONDS,
Major and C. S.

Witnesses:
JAMES C. SAVAGE.
SAM'L F. BISHOP.

ROBT. FLOYD.

[5 ct. stamp.]

It is understood that, as a proviso of this contract, I am to furnish all the hogs at the pork-house pens, also all the cooperage, salt, &c., at the pork-house yard.

H. C. SYMONDS,
Major and C. S.

No advertisement for bids or proposals was put out before making the contract, as required by act March 2, 1861, 12 Stat. 220.

After the contract was made, Major Symonds wrote to the Commisary General, informing him substantially of its terms, but no copy of it, nor the contract itself, was presented to the Commissary General for formal approval.

14 The Commissary General thereupon wrote to Major Symonds expressing his satisfaction at the progress made, and adds, "the whole subject of pork-packing at Louisville is placed subject to your direction, under the advice of Col. Kilbourn. It is a novel undertaking for the subsistence department, but I expect from your zeal and devotion to the subject to realize satisfactory results."

The claimant incurred large expenditures in the preparation for fulfilling his contract. He also during the whole season kept the full complement of hands necessary to have slaughtered the whole fifty thousand within the customary season.

During the season there were furnished to the claimant sixteen thousand one hundred and seven hogs, (16,107.) But owing to the high price of hogs, Major Symonds, with the approval of the Commissary General, gave up the enterprise, and refused to furnish the remainder of the fifty thousand hogs.

This suit is brought by the claimant to recover damages for the non-fulfilment of the contract by the United States.

15 And the measure of damages claimed was the difference between what it would have cost the claimant to do the work and the amount he was to receive for it.

Upon these facts the court held—

1st. That the Secretary of War, through the Commissary General, might authorize such a contract to be made without a resort to the advertisement and bids proposed.

2nd. That the letter of the Commissary Gen'l was a virtual approval of the contract.

3rd. That the contract was an engagement on the part of the United States to furnish fifty thousand hogs to the claimant, to slaughter and pack at the stipulated price, and that their failure in part to perform the same entitled the plaintiff to recover damages.

16 4th. That the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract.

17 In the Court of Claims.

ROBERT FLOYD
vs.
THE UNITED STATES. } No. 1,865.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the proceedings in the above-entitled cause, and of the final judgment of the court thereon; of the application of the solicitor of the United States for the allowance of an appeal, and the order of the court allowing the same; and of the finding of the facts by the court, and

the conclusions of law on said facts on which the court found its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of December, A. D. 1867.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 189.

THE UNITED STATES *vs.* J. S. SPEED AND D. H. DAVIES.

AND

No. 195.

THE UNITED STATES *vs.* ROBERT FLOYD.

BRIEF FOR THE UNITED STATES.

T. LYLE DICKEY,
Assistant Attorney General of the United States.

12 U.S. R 411, 412, 600

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE UNITED STATES
vs.
J. S. SPEED AND D. H. DAVIES. } No. 189.

AND

THE UNITED STATES
vs.
ROBERT FLOYD. } No. 195.

Brief for the United States, by T. Lyle Dickey, Assistant Attorney General.

Each of these cases is an appeal from a judgment of the Court of Claims against the United States, in the Speed and Davies case for $19,720 80, and in the Floyd case for $20,293 80.

The contract in the Smith and Davies case was made on the 25th day of October, 1864, and in the Floyd case on the 27th day of the same month.

Smith and Davies were furnished 17,132 hogs, and Floyd was furnished 16,107.

Aside from the difference in the name of the parties, the date of the contract, the number of hogs furnished to each, and the amount of the judgment, the cases are precisely alike in the facts found and the ruling of law by the Court of Claims.

This brief in form, therefore, will be addressed to the Floyd case, every word of which, however, will be just as applicable to the case of Speed and Davies.

FACTS.

In October, 1864, the Secretary of War, through the Commissary General, authorized Major Simonds, at Louisville, to buy hogs and enter into contracts for slaughtering and packing them, to furnish pork for the army.

On the 27th of October, Simonds, for the United States, and Floyd made a contract in writing.

First. That Floyd should slaughter, then cut, pack, and cure into *pork or bacon* 50,000 hogs as the commissary should direct.

That the hogs should be taken *at the pens*, sent to the slaughter-house pens, killed, dressed, and hung up to cool, then to be cut and put up in a manner specified in detail in the contract.

Second. That Floyd should provide himself with buildings, pens, tools, water, and labor necessary to do the work well.

That Floyd should receive therefor 92½ cents per 100 pounds net of hog meat—(the weighing to be done when the hog was cooled ready for cutting), and should be paid therefor 50 cents per 100 pounds for each 1,000 hogs packed, until the whole number *of hogs presented* be cured, when 25 cents per 100 pounds additional should be paid, and complete payment should be made when whole work performed.

That Simonds should furnish all the hogs *at* the pork-house pens; also, all the cooperage, salt, &c., at the pork-house yard; and the contract was agreed to be subject to the approval of the Commissary General of Subsistence.

No advertisement for bids or proposals was put out before making the contract.—(See act March 2, 1861, 12th Stat., 220.)

After the contract was made, Simonds wrote to the Commissary General, informing him substantially of its terms; but no copy of it, nor the contract itself, was presented to the Commissary General for formal approval. The Commissary General thereupon wrote to Symonds, expressing his satisfaction at the progress made, and

adding: "The whole subject of pork-packing at Louisville is placed subject to your direction under the advice of Colonel Kilburn.

"The claimant incurred large expenditures in the preparation for fulfilling his contract. He also kept during the whole season the full complement of hands necessary to have slaughtered the whole 50,000 hogs within the customary season. During the season there were furnished to the claimant 16,107 hogs: but, owing to the high price of hogs, Symonds, with the approval of the Commissary General, gave up the enterprise, and refused to furnish the remainder of the 50,000 hogs."—(See page 8 and 9, record.)

REMARKS.

I. Pork packing and curing bacon is not a business within the scope of the powers of the Secretary of War or his subordinates. The contract, is therefore, not binding upon the United States.

The act of 14th April, 1818, (3d Stat., p. 426, sec. 6 and 7,) enacts among other things: "The Commissary General and his assistants shall perform such duties in purchasing and issuing of rations * * * * as the President shall direct;" and in section 7 it provides that "supplies for the army (unless in particular and urgent cases the Secretary of War should otherwise direct) shall be *purchased* by contract, * * * on public notice," &c., "which contract shall be made under such *regulations* as the Secretary of War may direct." And by the act of March 2, 1861, (12 Stat., p. 220,) it is provided that "all purchases and contracts for supplies or services in any of the departments of the government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals."

It will be observed that the statutes speak in all these cases of *purchasing* and nowhere speak of *manufacturing*. Where Congress has intended that the government shall embark in the business of manufacturing any of the *materiel* of war, it has made special provision by law for the same. It has established armories and navy yards, and provided for the making of arms and the building of vessels; but nowhere can be found any enactment authorizing any officer or class of officers to embark the government in the business of manufacturing pork or bacon, or in the business of raising corn, or hogs, or cattle, or horses, or mules, or asses for the army.

II. The contract is not binding upon the United States, because it contains no provision "for the termination" of the contract "at such time as the Commissary General may direct."

By the act of April 14, 1818, (3d Stat., p. 426, sec. 7,) quoted above, supplies are to be purchased by contract, "*which contract shall be made* under *such regulations* as the *Secretary of War may direct*."

By looking at the Revised Army Regulations of 1863, (in force at the time of making this contract,) page 241, section 1,179, it will be found that the Secretary of War had, as authorized by the statute of 1818, *directed* a regulation that "*these agreements* shall expressly provide *for their termination* at *such time* as the *Commissary General may direct*."

This contract with Floyd, containing no such provision, is a contract made in violation of the statute of 1818, and is not binding upon the United States.

III. If the want in this contract of the provision, for its termination at such time as the Commissary General shall direct, does not vitiate the contract, it must be held that the contract will be treated as *containing* the *clause*, inasmuch as the law requires that it should contain the clause. The only way in which the law, and the regulation made under the law, and the contract can all stand, is to treat the contract as containing the clause, dispensing with the mere form of writing out the clause in the contract, upon the ground that the public law of the

land enters into and becomes, without being expressed, a part of every lawful contract which is made.—(As to the proposition that the army regulations have the force of law, see Gratiot *vs.* the United States, opinion by Justice Wayne, near the bottom of page 117.) 4th Howard

If the contract is regarded as containing this provision, then there is an end of this case, for in that case it was no violation of the contract for Symonds, with the approbation of the Commissary General, to terminate the contract at any time.

IV. This contract is not binding upon the United States, because there was no advertisement for proposals before the contract was made.—(See act March 2, 1861, 12 Stat., 220.)

The Court of Claims do not find that any public exigency required "the immediate delivery of the article, or performance of the service;" on the contrary, the very nature of the contract shows that immediate delivery or immediate performance was not contemplated. This is an important question, arising in a great many cases in the Court of Claims; and that court desires very much the decision of this court on that question.

V. Where a contract is made subject to the approval of the Commissary General, it is not binding on the United States until it is so approved, after the commissary has full knowledge of all the provisions and defects of the contract. It is not sufficient that he be informed "substantially of its terms," as the court found in this case. Does this show that the Commissary General was informed that this contract contained no clause for its termination at the will of the Commissary General? Does this show that the Commissary General was informed that the contract was made privately without advertisement for proposals, as required by law and the regulations? Is it to be presumed that the Commissary General ever would have approved such a contract under such facts if he had been fully advised? It is respectfully submitted that this contract was not approved by the Commissary General, and on its face it is not binding until that approval be given.

VI. By the terms of the contract, the United States

were not bound to furnish to the claimant any given number of hogs. The true construction of the contract is, that claimant agreed to slaughter the "hogs presented" by the United States, for the price per hundred pounds specified, up to the number of 50,000 hogs.

VII. Assuming the contract valid and binding upon the United States, and that it required the United States to furnish the full 50,000 hogs, and that it could not be terminated by the Commissary General without the consent of the claimant, still the facts found do not show a statement of case enabling claimant to have an action for a breach of the contract by the United States.

The court finds that "claimant incurred large expenditures in preparation *for fulfilling* his contract. He also during the whole season kept the full complement of *hands* necessary to have slaughtered the whole fifty thousand within the customary season. During the season there were furnished" (by the government it is presumed) "to the claimant 16,107 hogs. But, owing to the high price of hogs, Major Symonds, with the approval of the Commissary General, gave up the enterprise, and refused to furnish the remainder of the 50,000 hogs."

This is all that is said as to the readiness and willingness of claimant to perform his contract, and of the failure of the United States to perform.

Though "claimant incurred large expenditures in the preparation *for* fulfilling his contract," yet it nowhere appears that he *completed* the *necessary preparation* to fulfill his contract, or that he was ever *ready at any time* to slaughter *a single hog*. True, he kept all "the hands necessary," but it required *other things* beside hands. The contract specifies "buildings, pens, tools, and water," and it does not appear that any one of these things was provided. The claimant was to provide the pens; the government was to furnish the hogs from time to time at the pens; and claimant was to take them from the pens in installments and slaughter them. The government furnished 16,107 hogs, but it does not appear that there were any pens provided to receive them, or that claimant *did* receive them or any of them, or slaughter them or any of them. It is an old adage, on which courts

have long acted, that "what doth not appear, doth not exist." Owing to the high price of hogs, Symonds gave up the enterprise and refused to furnish the residue of the hogs, as he had a right to do on the facts stated, assuming *that* to be a *full* statement of *all* the facts. That is, the high price of pork furnished the reason which impelled the commissary, Symonds, to avail himself of his right under the facts to abandon the contract, rather than insist upon the full performance on the part of the claimant.

The covenants or undertakings in this contract are clearly mutual and dependent, and before claimant can recover for *the* breach alleged, he must show a readiness, a willingness, and an offer on his part to perform. Nothing of the kind is shown by this record.

VIII. The rule for the measure of damages is not a correct rule as applied to the facts found.

Claimant "during the whole season kept the full complement of hands necessary to have slaughtered the whole 50,000 hogs," but it does not appear that these hands were kept in idleness, or even unprofitably employed. For aught that appears, these very hands and the other expensive preparations were in fact more profitably employed in slaughtering hogs for other parties, which work could not have been performed if the government contract had not been abandoned. In fact, the abandonment of the contract by the government may have been a source of profit to claimant rather than of loss.

Before the true damages, if any, in this case can be assessed, the claimant must show the actual surroundings at the time. Nothing having been shown as a basis to which to apply any rule, the claimant was in any view of the case entitled to nominal damages only.

T. LYLE DICKEY,
Assistant Attorney General of the United States.

U. S. SUPREME COURT.

DECEMBER TERM, 1868.

ADJOURNED SESSION OF OCTOBER, 1869.

THE UNITED STATES, APPELLANT,
vs.
J. SMITH SPEED,
DAVID H. DAVIES,
} No. 189.

And

THE UNITED STATES, APPELLANT,
vs.
ROBERT FLOYD, APPELLEE.
} No. 195.

BRIEF FOR APPELLEES.

HUGHES, DENVER & PECK.

H. Polkinhorn & Co., printers, D st., bet. 6th and 7th sts., Washington.

In the Supreme Court of the United States.

APPEAL FROM THE COURT OF CLAIMS.

THE UNITED STATES, APPELLANT,
vs.
ROBERT FLOYD, APPELLEE. } No. 195.

Brief for the Appellee.

In this case it is sought to reverse the judgment of the Court of Claims upon eight different grounds.

We will consider these objections in the order in which they are presented by the learned Assistant Attorney General.

I.

That pork packing and curing bacon is not a business within the scope of the powers of the Secretary of War or his subordinates.

The statutes provide that the "Commissary General and his assistants shall perform such duties, in purchasing and issuing of rations to the army of the United States, as the President may direct.

"Supplies for the army, *unless in particular and urgent cases the Secretary of War should otherwise direct*, shall be purchased by contract, to be made by the Commissary General, on

public notice, to be delivered, on inspection, in the bulk, which contract shall be made under such regulations as the Secretary of War may direct." (Brightly's Dig., p. 67.) 1 Stat. 899. 3 Mar. 2 U. S. 554

Here is one of those particular and urgent cases, where the Secretary of War directed that rations should be procured by purchasing hogs and slaughtering and packing them. (See the finding of the Court of Claims, 1st point, p. 7.)

It would be an absurd restraint upon the Secretary of War to prohibit him from feeding the army in this way. Congress never intended to prevent him from exercising such discretion. The law and the regulations define the usual course of proceedings. This case falls expressly within the exception of the statute.

The evidence details the reasons for pursuing this exceptional course. An attempt had been made to forestall the market, and compel the Commissary department to pay extortionate prices for pork.

If the Secretary of War has no power to purchase live animals and slaughter them for the use of the army, it is fortunate that the discovery was not made until the war was over; for, during its whole period, our armies on the march were fed in this way.

No statute has been considered necessary to authorize the *manufacture* of an ox into beef; and converting a hog into pork is very much the same thing.

II AND III.

That the contract is not binding upon the United States, because it contains no provision for the termination of the contract.

The act already cited shows that the regulation relied upon has no application to those cases where the Secretary

of War directs a contract to be made otherwise than according to its provisions.

The statute and the regulations provide for the general routine. If a contract is to be made outside of these regulations, it requires the special authority of the Secretary. Such express directions were given in this case.

There is no army regulation which applies here, not only for the reason above given, but the phraseology of the regulations does not fit the subject-matter.

§ 1179 (p. 241) is as follows:

"Contracts for subsistence stores shall be made after due public notice, and on the lowest proposal received from a responsible person who produces the required article. These agreements shall expressly provide for their termination at such time as the Commissary General may direct, and for the exclusion of any interest in them on the part of members of Congress, officers, or agents of the Government, and all persons employed in the public service. (Forms 36 and 37.)"

These claimants were not furnishing *subsistence stores.* They were acting under a special contract, with reference to which no regulations had been framed, *i. e.*, slaughtering hogs for the Government. This matter was kept under the personal management of the Secretary of War, the Commissary General, and Major Symonds. While the business was thus limited, no general regulations were needed. If the experiment had been a successful one, the business might have been extended to other cities, and then suitable regulations would have been made to govern it.

The language of Reg. 1179—"These agreements shall expressly provide for their termination at such time as the Commissary General may direct"—manifestly refers to contracts for supplying rations to soldiers from day to day, and, as the length of time soldiers will remain at a post

cannot be foreseen, the contracts stop running at the election of the Commissary General. If there was any doubt upon this point, an examination of forms 36 and 37, referred to, would dispose of it.

IV.

That the contract was not binding on the United States because there was no advertisement for proposals before the contract was made.

The act to which this objection refers is that of March 2, 1861, (12 Stat., p. 220:)

"*And be it further enacted*, That all purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising, a sufficient time previously, for proposals respecting the same. When immediate delivery or performance is required by public exigency, the articles or service required may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals."

This act expressly excepts those cases in which the public exigency requires the immediate performance of the services.

The finding of the Court is silent as to whether or not such an exigency existed. The Attorney General assumes that the burden is upon the claimant to show in the Court of Claims that such exigency existed. We insist that the contract having been made by a duly authorized officer of the Government and approved by the Commissary General, it must be presumed, until the contrary is shown, that they performed their duty, and that the exigencies of the service were such as to justify their action.

The rule is laid down by this Court that—

"Where a particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision thereon, in the absence of any controlling provision, is absolutely final."

Phil. & Trent. R. R. Co. *vs.* Stimpson, 14 Peters, 448.
Allen *vs.* Blunt, 3 Story R., p. 742.
Wilkes *vs.* Dinsman, 7 How., 89.
Martin *vs.* Mott, 12 Wheaton, 19.
Gould *vs.* Hammond, 1 McAllister, 235.

This principle is particularly applicable to the case before the Court.

Whether a public exigency exists is not a matter equally within the knowledge of both parties. The officer must, of necessity, be the sole and exclusive judge of it. The language of the statute, "public exigency," is an expression of the broadest and most indefinite character. To strictly define it would be impossible. And to ask a civilian to decide upon it, at the risk of his contract, is a more arbitrary requirement than was ever made by any Government. If such was the law, the unfortunate contractor would at least have a right to call for a full disclosure of the facts; he would have a right to know what the contemplated movements of the army were; whether a particular demonstration was intended as a feint or a real attack; and many other things which public policy forbids him to know.

The law directs its officers how to transact the public business, and holds them responsible. For a breach of duty in this regard they are punishable.

A case might be supposed in which the purchasing officers and the contractors would disagree as to the existence of an exigency.

When General Sherman was preparing to evacuate Atlanta, who, that was not in the secrets of the Government, could say that there was a public exigency which required the immediate concentration of a fleet of transports laden with stores at Savannah?

If contractors, who act in good faith, are not to be protected by the decision of the War Department upon this question, an element of uncertainty is introduced into this business which will react most unfavorably for the Government.

Contractors have no control over the matter of advertising for bids. If the officer advertises, they put in their proposals. If he decides that he cannot advertise, they offer their services upon his own terms in this particular.

In this case there is neither proof nor finding that either the officer or the contractor acted otherwise than in the most entire good faith. The Attorney General, however, intimates in his brief that the contract shows that immediate performance was not contemplated.

The fact is just the other way. The contract was made on the 27th of October, and that was the very latest time in the season at which it would have been practicable to undertake the work. His contracts must have been closed immediately or the plan abandoned for that season.

We do not deny that cases may arise showing a palpable collusion between the officer and contractor to defeat this statute. When such an issue is presented, neither this Court nor the Court of Claims will have any difficulty in dealing with it.

Neither is it necessary for us to claim that the statute is merely directory. What we do claim is, that the statute directs the officer to advertise for proposals, unless in his judgment, or in the judgment of his superior officers, the public exigency requires such an immediate performance of the services as to render an advertisement impractica-

ble; and that, if the officer and the contractor both act in good faith, the decision of the officer as to this exigency cannot be reviewed to invalidate the contract.

V.

That the contract is not binding upon the United States because it was by its terms subject to the approval of the Commissary General, and is not binding until so approved.

1. Whether the contract was approved by the Commissary General is one of the ultimate facts which, by the rules of this Court, should be found by the Court of Claims; and they state, as one of their conclusions, "that the letter of the Commissary General was a virtual approval of the contract."

Where the Court below state both the evidence and the conclusion drawn from the evidence, you will disregard the evidence and accept their conclusion as to the ultimate fact.

2. The findings show that Major Symonds informed the Commissary General of the terms of the contract, and that officer replied, expressing his satisfaction at what had been done. In the absence of any law or regulation requiring his approval to be manifested in any particular method, this was sufficient.

3. It was not necessary to the validity of the contract that it should be approved by the Commissary General.

Major Symonds was fully authorized to make the contract. There was nothing in the statutes, or the army regulations, or the special instructions given him which required the insertion of this clause.

It was not a condition precedent that such approval should be had.

"Where plaintiff agreed to effect an insurance for the defendant with such names as should be to his satisfaction, and the voyage was performed without the defendant requiring to see the names on the policy, he cannot object in an action for the premium, that the names of the underwriters had never been exhibited to him for approval." *Dixon vs. Hovill*, 4 *Bing.*, 665.

"Where in a proposal to one to go out as surgeon of an emigrant ship, it is stated that the appointment was subject to the approval of certain commissioners, the approval of the commissioners was held not to be a condition precedent to the obligation assumed by the surgeon." *Richards vs. Hayward*, 2 *M. & G.*, 574.

This was an action brought against the surgeon for refusing to proceed on the voyage, and the Court held that the defendent was liable although it was not averred that his appointment had been approved; that it was a subsisting contract liable to be defeated by the condition subsequent, which must be shown by the defendant.

"Where there is an agreement that lessee should spend so much in repairs, to be inspected and approved of by lessor, lessee to be allowed to retain the same out of the rent, the lessor's approval is not a condition precedent to lessee's retaining the rent." *Dallman vs. King*, 4 *Bing.*, 105.

Conditions subsequent, are never favored in law, because they operate retroactively to divest rights which have already attached.

This is especially the case when the condition subsequent does not depend upon the action of the plaintiff, but is in the nature of a privilege or advantage reserved to the defendant.

If Floyd had slaughtered the whole number of 50,000 hogs, and then claimed three dollars each upon a *quantum meruit*, he would not have been allowed to treat the contract as a nullity, because it had not been formally approved of by the Commissary General. All the more should the

United States be estopped from setting up this defence, because the approval was an act to be performed by it.

It would be a fraud for the Government, by its authorized officers, to pigeon-hole the contract, then treat it as being in full operation, derive all the benefits desired under it, and when it became convenient to rid itself of liabllity to allege its own breach of duty as a ground for annulling it.

The claimant had a right to suppose that Major Symonds had obtained a satisfactory approval from his superior officer, when he called upon him to go on with the execution of the contracts. As the Major had the power to make the contract without this clause, he had the power to strike it out of the contract, after it had been made, (the claimants consenting.) And this included the authority to waive it. This failure to submit the contract, was a waiver of the condition, and if the contract was not approved, it was for this reason and no other.

A condition may be waived by consent or by acts; and a party who does not insist upon the condition, at a time when equity and good conscience demand that he should do so, thereby waives its performance.

Fleming *vs.* Gilbert, 3 Johnson's R., 530.
Smith *vs.* Lynes et al., 1 Selden, 41.
Cole *vs.* Champlain Co., 26 Verm., 87.
Dixon *vs.* Hovill, 4 Bing., 665.

It will always excuse the performance of a condition precedent that the performance was hindered or waived by the other party.

Camp *vs.* Barker, 21 Verm., 469.
The Mayor, &c., of New York *vs.* Butler, 1 Barb., 338.
Mains *vs.* Haight, 14 Barb., 77.
Smith *vs.* Gugerty, 4 Barb., 615.
Marshall *vs.* Craig, 1 Bibb., 384.

Majors *vs.* Hickman, 2 Bibb., 218.
Jones *vs.* Walker, 13 B. Mon., 163.

"If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition.

"Thus, if the precedent act is to be performed at a certain time or place, and the strict perfomance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract has imposed upon him." (Williams *vs.* The Bank of the U. S., 2 Peters, 102.)

"A party entitled to avail himself of a condition precedent, who waives its performance, and proceeds to fulfill the contract on his part, it seems is estopped from relying upon the condition precedent, in an action subsequently brought against him for carelessness and negligence in the performance of the contract. (Nelson, J. Betts *vs.* Perrine, 14 Wend., 219.)

"A waiver of the performance of a condition precedent is not to be implied from the mere silence of the other party in case of a breach, unless such silence be inconsistent with any other explanation; nor will a mere indulgence be considered as a waiver of forfeiture.

"But if a condition precedent being unperformed, the other party proceed to perform his part of the contract, such an act will be construed as a waiver of the condition by him and he will thereby be estopped from relying upon the non-performance thereof, in an action brought against him, for negligence in the performance of his contract." (1 vol. Story on Const., p. 37, § 32 *a.*)

These cases all rest upon the maxim that he who remains silent when justice demands that he should speak, shall not be allowed to speak when justice demands that he should remain silent.

VI.

That, by the true construction of the contract, the claimant was required to slaughter any number of hogs, up to 50,000, *but that the United States was not bound to furnish any specified number.*

The contract is in all respects mutual. Claimant agrees to slaughter 50,000 hogs, and the United States agrees to deliver them at the pork-house pens.

There is not a word anywhere indicating any option upon either part as to the number.

VII.

The seventh objection of the Attorney General is, that the finding of the Court does not sufficiently show that the claimant was ready and offered to perform the contract on his part.

It does, however, show that he incurred large expenditures; that he, during the whole season, kept the full complement of hands necessary to have slaughtered the whole 50,000 hogs.

This is not as full and accurate a statement as might have been made of the plaintiff's readiness to fill the contract, but it is amply sufficient.

The reason for its not being more explicit is, that the evidence was so complete upon that point that no contest was made upon it in the Court below.

This is a court of appeal instituted to examine into the alleged errors of inferior tribunals, and suitors are not encouraged to raise issues here which were not made before the Court having original jurisdiction.

That the claimant provided himself with all things necessary to comply with the contract is evidenced by the fact that he did slaughter more than 16,000 hogs furnished by the Government.

VIII.

The measure of damages.

Upon the facts shown by the finding of the Court, the law presumes that certain damages follow.

If there were any exceptional circumstances in this case it would devolve upon the defendant to show them. The rule laid down by the Court, if erroneous, is an error in favor of the appellant.

Masterson *vs.* Mayor of Brooklyn, 7 Hill, 62.
Story *vs.* N. Y. & Har. R. R. Co., 1 Selden, 85.
Phil. & Balt. R. R. Co. *vs.* Howard, 13 Howard, 344.
Chamberlin *vs.* Scott, 33 Vt., (4 Shaw,) 80.
Royalton *vs.* Turnpike Co., 14 Vt., 311.
Clark *vs.* The Mayor, &c., of New York, 4 Comst., 338.
Story *vs.* N. Y. & N. H. R. R. Co., 2 Seld., 85.
Durkee *vs.* Mott, 8 Barbour, 423.
Clark *vs.* Marsiglia, 1 Denio, 317.
Shannon *vs.* Comstock, 21 Wend., 457.
Hay *vs.* Gronoble, 34 Penn. St. R., 9.
Miller *vs.* Mariner's Church, 7 Greenl., 51.
Shaw *vs.* Nudd, 8 Pick., 13.
Swift *vs.* Barnes, 16 Pick., 196.
Haggin *vs.* Price, 8 Dana, 48.
Thompson *vs.* Jackson, 14 B. Mon., 114.
Western *vs.* Sharp, 11 B. Mon., 177.
Palm et al., *vs.* O. & M. R. R. Co., 18 Ills., 217.
County of Christian *vs.* Overholt, 18 Ills., 223.
George *vs.* Cahawba R. R. Co., 8 Ala., 234.
Cunningham *vs.* Dorsey, 6 Cal., 19.
Diboll *vs.* Minott, 9 Iowa, (1 With.,) 403.
Tait *vs.* Sherman, 10 Iowa, (2 With.,) 60.
Hadley *vs.* Baxendale, 9 Exch., 353.

The rule adopted by the Court of Claims is as follows :

"4th. That the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it; making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

This is incorrect. The proper rule is: "The difference between the cost of doing the work and what the plaintiff was to receive for it; making reasonable deductions for the diminished care, risk, &c., *and adding the outlay already made by the plaintiff in doing that portion of the work which was withheld from him;*"—

Or, as it is sometimes stated, "The difference between the contract price *and what it would cost the plaintiff to do the work, taking into account the expenses he has already incurred in that behalf*—less the diminished care, risk," &c.

If the the contract price for the unfinished work was $70,000, and the reasonable cost of doing the work was $50,000, and the plaintiff had actually expended $25,000 towards this unfinished work, the correct estimate of damages would be $45,000, and not $20,000.

The latter sum would not reimburse the plaintiff for his expenditures, much less compensate him for his loss of profits.

This is exactly the injustice we have suffered under the rule first stated.

HUGHES, DENVER & PECK,

Attorneys for the Appellee.